



July 20, 1999

Mr. Scott Kelly  
Deputy General Counsel  
Texas A&M University System  
301 Tarrow, 6<sup>th</sup> Floor  
College Station, Texas 77840-7896

OR99-1599

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125854.

The Texas A & M University System (the "system") received a request for proposals and contracts relating to the most recent "pharmaceutical Benefit Management Plan." You state that no contract has been signed in this matter and that you have released certain responsive documents. You assert that release of the remaining responsive information implicates the proprietary interests of named third parties, and may be protected by section 552.110 of the Government Code. You have supplied the subject information to our office for review. The system asserts no position on the applicability of any exception to disclosure for the responsive information.

We note that the request for information is dated February 25, 1999, and that the system's request for opinion was received by this office on April 27, 1999. Thus, the system failed to request an open records decision from this office within the ten business day period required under Government Code section 552.301. This failure to timely request a decision results in the legal presumption that the requested information is open to the public. Gov't Code §552.302. The presumption arising under the ten day rule can be overcome only by a compelling demonstration that the information should not be released, for example, where it is made confidential by other law, or where third party interests are at issue. Open Record Decision No. 150 (1977). In this case, you have identified third parties whose interest you contend are implicated by the release of the subject information.

Pursuant to section 552.305 of the Government Code, this office notified the following firms, identified by you as third parties whose interests are implicated by the release of the subject information: Advance Paradigm, Blue Cross Blue Shield of Texas, Diversified Pharmaceutical Services, Inc., Express Scripts-Value Rx, Merck-Medco Managed Care, L.L.C., PCS Health Systems, Inc., and WHP Health Initiatives, Inc. The notice informed

these parties of the request and provided each the opportunity to claim the exceptions to disclosure it contends apply to the requested information, together with argument in support of those exceptions. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in certain circumstances).

PCS Health Systems, Inc. ("PCS") responded, asserting that all information that it submits in response to requests for proposals is proprietary. PCS also identified specific responsive information that it did not wish to be released. However, it did not assert any exception to disclosure under chapter 552 of the Government Code or provide argument in support of any such exception. The information submitted by PCS must therefore be released.

Blue Cross Blue Shield of Texas ("Blue Cross") responded, identifying certain information that it contends is excepted by section 552.110. However, Blue Cross did not supply argument in support of this exception. The information submitted by Blue Cross must therefore be released.

Each remaining party provided argument in support of its contention that information identified by it is excepted under section 552.110 of the Government Code.<sup>1</sup> This section protects the property interests of those supplying information to governmental entities by excepting two types of information from disclosure: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code §552.110. Because the discussion under the "commercial or financial information" branch of section 552.110 applies equally to all these parties, we shall address that branch of the exception first.

#### COMMERCIAL OR FINANCIAL INFORMATION

Our office has previously held that information could be withheld under the "commercial or financial information" branch of section 552.110, if release of the information is likely to either (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained, applying the test articulated in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir 1974). However, this rationale was expressly rejected by the Third Court of Appeals, which recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL

---

<sup>1</sup>It was also contended that certain information is excepted by section 552.101 of the Government Code. However, argument under that section did not expand the protection afforded under section 552.110. Section 552.104 was also raised by a third party. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations; it is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 (1991).

314976 (Tex. App.--Austin May 20, 1999, no pet. h.). A specific judicial ruling or statute must therefore be shown to make the respective information privileged or confidential in order for the information to be excepted from disclosure under this branch. As neither the system or any third party has indicated a judicial ruling or statute that specifically makes any of the subject information privileged or confidential, and we are unaware of any such ruling or statute, we conclude that none of the subject information may be withheld under the "financial information" branch of section 552.110 of the Government Code. We turn now to the "trade secrets" branch of section 552.110.

### TRADE SECRETS

Texas courts apply the "trade secret" definition specified in section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). To wit:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939);

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Our office has held that a claim for the trade secrets exception will be accepted when a third party making the claim asserts factual allegations sufficient to establish a *prima facie* case for the exception, provided that a governmental body takes no position on the claim and no one submits an argument that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990). We now address the arguments for excepting information as trade secrets presented by each party.

#### Advance Paradigm

Advance Paradigm (“AP”) asserts that information in supplements 3 and 17 of the materials that it submitted, pertaining to rebate payments and pricing information respectively, is excepted from disclosure as trade secrets. From our review of the AP materials, we conclude that the information contained therein is not of the type protected as a “trade secret” under the Restatement of Torts definition. Therefore, this information may not be withheld as a trade secret under section 552.110 of the Government Code.

#### Diversified Pharmaceutical Services, Inc.

Attorneys representing Diversified Pharmaceutical Services, Inc. (“Diversified”), assert that attachments 3, 5, 6, 9, 11, 12, 13, 14, 15, 16, 18, 19, and 20 as well as the Executive Summary, Background Information, Cost/Plan Design, Network, Member Services/Provider, Relations/Quality Assurance, Drug Utilization Review, Eligibility, Claims Processing, Customer Services, Implementation, Rebates, Performance Guarantees, Management Reporting, Quality Control, Future Options, and Price Proposal portions of the information submitted by Diversified is excepted from disclosure as a “trade secret.” From our review of the Diversified materials, we conclude that in part, these materials, including proprietary forms and computer screens, constitute information of the type protected as a “trade secret” under the Restatement of Torts definition. Diversified globally asserts factual allegations of compliance with each of the six Restatement of Torts identifying criteria. Based on these factual allegations and a review of the subject information, we conclude that Diversified has established a *prima facie* case that some of its information may be withheld as a trade secret under section 552.110 of the Government Code. However, some of the subject information is not of the type protected as a trade secret. We have marked the materials submitted by Diversified to indicate the information that may be withheld as a trade secret under section 552.110 of the Government Code, the remaining information must be released.

#### Express Scripts-Value Rx

Express Scripts-Value Rx (“Express”) asserts that its proposal is excepted in its entirety. Express lists several specific items, the release of which it contends present a risk of substantial competitive harm. Express alleges that certain information was “developed over many years” by its staff and that it “invested tremendous time and effort” at “great effort and expense” in this development. Express alleges that the information is “safeguarded from nonconfidential disclosure both within and without” the firm. However, Express does not

allege any specific measures taken to maintain the secrecy of the information. Express's allegations are not sufficient to establish a *prima facie* case that the information may be withheld as a trade secret under section 552.110 of the Government Code.

Merck-Medco Managed Care, L.L.C.

Merck-Medco Managed Care, L.L.C. ("Merck") asserts that portions of its answers to questions 1, 2, 3, 4, 5, 6, 7, 8, and 10 and its "Standard<sup>PLUS</sup> Reporting Series/Concurrent DUR Reports/Formulary Compliance Reports" exhibits and clinical addendum are excepted as trade secrets. Merck alleges that certain information was "developed at great expense," and that it "expended considerable resources" in this development. Merck does not allege any specific measures taken to maintain the secrecy of the information. Merck's allegations are not sufficient to establish a *prima facie* case that the information may be withheld as a trade secret under section 552.110 of the Government Code.

WHP Health Initiatives, Inc.

WHP Health Initiatives, Inc. ("WHP") asserts that portions of its appendices D, H, I, J, and L, and its responses to questions 1, 2, 3, 4, 8, and 9, as well as all of its responses in the Pricing Arrangement and Performance Guarantees sections of its proposal, are excepted from public disclosure by section 552.110 of the Government Code. From our review of the WHP materials, we conclude that the information is not of the type protected as a "trade secret" under the Restatement of Torts definition. Therefore this information may not be withheld as a trade secret under section 552.110 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/ch

Ref: ID# 125854

Encl. Submitted documents

cc: Ms. Rose Santos  
FOIA Group, Inc.  
101 S. Whiting Street, Suite 1600  
Alexandria, Virginia 22304  
(w/o enclosures)